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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/445,043	03/20/2000	IAN BAIRD-SMITH	350013-65	9395
34205 7590 06/29/2012 OPPENHEIMER WOLFF & DONNELLY LLP BARBARA A. WRIGLEY CAMPBELL MITHUN TOWER 222 SOUTH NINTH STREET, SUITE 2000 MINNEAPOLIS, MN 55402				
EXAMINER HYLTON, ROBIN ANNETTE				
ART UNIT 3788		PAPER NUMBER		
NOTIFICATION DATE 06/29/2012		DELIVERY MODE ELECTRONIC		

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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* IAN BAIRD-SMITH, ANDREAS ZIEGLER,  
REINHART GEISLER, and WERNER HAMMON

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Appeal 2010-004032  
Application 09/445,043  
Technology Center 3700

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Before: JENNIFER D. BAHR, JOHN C. KERINS, and  
KEN B. BARRETT, *Administrative Patent Judges*.

BAHR, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Ian Baird-Smith et al. (Appellants) appeal under 35 U.S.C. § 134 from the Examiner's decision rejecting claims 1, 3, 4, 6, 8-11, and 13. We have jurisdiction under 35 U.S.C. § 6(b).

We REVERSE.

*The Claimed Subject Matter*

Claim 1, reproduced below, is illustrative of the claimed subject matter.

1. A container assembly comprising a closure for an open-ended container, and an open-ended container, the container assembly comprising:

(i) a flexible membrane for closing the open end of the container;

(ii) an adhesive seal between the flexible membrane and the container;

(iii) a rigid cap having a resiliently deformable member juxtaposed to the flexible membrane such that when the cap is in use, the flexible membrane is pressed against the container in the vicinity of the seal, thereby reinforcing the seal sufficiently to withstand high pressures which are generated from cooking the contents of the container;

(iv) the rigid cap further having a first cam and follower pair, which when in use is engaged with a second cam and follower pair located on the container neck, relative movement between the first and second cam and follower pairs in a predetermined direction causes the rigid cap and the container neck to approach one another, thereby increasing the pressure exerted by the resiliently deformable member on the flexible membrane; and

(v) the rigid cap further having a laminar member and an annular skirt, the skirt extending downwardly from the laminar member, and the second cam and follower pair is secured on an upper wall of the skirt,

wherein the laminar member is spaced from the flexible membrane by a distance less than the maximum possible

extension of the flexible membrane towards the laminar member.

*Evidence*

The Examiner relied on the following evidence in rejecting the claims on appeal:

Hardt	US 4,328,905	May 11, 1982
Sekiguchi <sup>1</sup>	JP 62-122962	Jun. 4, 1987
Hiroshi <sup>2</sup>	JP 6-219464	Aug. 9, 1994

*Rejections*

Appellants request review of the following rejections by the Examiner:

Claims 1, 3, 6, 9, 10, and 13 are rejected under 35 U.S.C. § 102(b) as anticipated by Sekiguchi.

Claim 8 is rejected under 35 U.S.C. § 103(a) as unpatentable over Sekiguchi.

Claim 11 is rejected under 35 U.S.C. § 103(a) as unpatentable over Sekiguchi and Hardt.

Claims 1, 3, 4, 6, 8-10, and 13 are rejected under 35 U.S.C. § 103(a) as unpatentable over Hiroshi and Sekiguchi.

Claim 11 is rejected under 35 U.S.C. § 103(a) as unpatentable over Hiroshi, Sekiguchi, and Hardt.

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<sup>1</sup> We derive our understanding of this reference from the English language translation verified by translator Mike Forrest, dated September 11, 2009, made of record in the electronic file wrapper of the present application.

<sup>2</sup> We derive our understanding of this reference from the English language translation entered into the electronic file wrapper of the present application on August 8, 2001, and from the European Patent Office Abstract of this reference, entered into the electronic file wrapper of the present application on March 21, 2000.

OPINION

The issue raised in this appeal is whether Sekiguchi discloses that the rigid outer cap 3 is spaced from the inner cap 2 “by a distance less than the maximum possible extension of the flexible membrane [inner cap 2] towards the laminar member [rigid outer cap 3],” as required in claim 1. App. Br. 17-19, 22-23; Reply Br. 4-5, 8-11; Ans. 3, 5, 6-7.

Sekiguchi describes a container 1 made of rigid material and comprising an inner cap 2 made of a flexible material heat sealed on the end of the opening of the container 1, and an outer cap 3 made of a rigid material, with an airtight space 4 formed between the inner cap 2 and the outer cap 3. Transl. 4. Sekiguchi also discloses placing packing 5, consisting of silicone rubber or similar material, between the inner and outer caps for preventing peeling of the heat seal part of inner cap 2. *Id.* Sekiguchi discloses that the internal pressure of the air layer in the airtight space 4 and the internal pressure of the container are balanced through expansion and contraction of the airtight space, thereby preventing the inner cap and its seal from being subjected to a “particularly great force” and consequently preventing the seal from being broken. *Id.*

Sekiguchi discloses that balancing the pressure in the container and the pressure in the airtight space 4 between the flexible inner cap 2 and the rigid outer cap 3 prevents the inner cap 2 and its seal from being subjected to a sufficiently great force to break the seal between the inner cap and the container opening. Sekiguchi is silent as to whether the spacing between the inner cap and the outer cap is greater than, equal to, or less than the maximum possible extension of the flexible inner cap 2 toward the outer cap 3, and gives no hint or suggestion that the relationship between the maximum possible extension of the inner cap 2 and the distance from the

inner cap to the outer cap is of particular significance in preventing rupture of the inner cap 2 or its seal.

We find no support in Sekiguchi for the Examiner's finding that "[i]t can be seen that the lowermost point of the laminar member is spaced from the flexible membrane by a distance less than the maximum possible extension of the flexible membrane towards the laminar member." *See* Ans. 3. Further, it is not apparent that Sekiguchi's figure 1 shows the flexible membrane "to be at its maximum spaced distance from the laminar membrane," and the Examiner has not explained the basis for this finding. *See* Ans. 6. Indeed, Sekiguchi's drawings shed no light on the relationship between the distance of the inner cap 2 from the outer cap 3 and the maximum possible extension of the flexible membrane. Finally, it is not apparent, and the Examiner has not adequately explained, how "[t]he smallest amount of movement of the flexible membrane toward the laminar member will meet the claimed limitation." *See* Ans. 6.

For the above reasons, we agree with Appellants that Sekiguchi does not disclose that the rigid outer cap 3 is spaced from the inner cap 2 "by a distance less than the maximum possible extension of the flexible membrane [inner cap 2] towards the laminar member [outer cap 3]," so as to anticipate the subject matter of claim 1. Thus, we do not sustain the rejection of claim 1 and its dependent claims 3, 6, 9, 10, and 13 as anticipated by Sekiguchi.

In rejecting claim 8 as unpatentable over Sekiguchi and claim 11 as unpatentable over Sekiguchi and Hardt, the Examiner does not articulate any reason why it would have been obvious to modify Sekiguchi to cure the deficiency noted above or rely on Hardt for any teaching directed to the spacing between the inner and outer caps. Thus, we do not sustain the rejections of claims 8 and 11.

As evident in our discussion of Sekiguchi above, Sekiguchi provides no teachings directed to the relationship between the distance that the outer cap 3 is spaced from the inner cap 2 and the maximum possible extension of the inner cap toward the outer cap. Rather, Sekiguchi relies on balancing the pressure in the container and the pressure in the airtight space 4 to prevent the inner cap 2 and its seal from being subjected to a sufficiently great force to break the seal between the inner cap and the container opening.

It is incumbent upon the examiner to establish a factual basis to support the legal conclusion of obviousness. *See In re Fine*, 837 F.2d, 1071, 1073 (Fed. Cir. 1988). The Examiner may not, because of doubts that the invention is patentable, resort to speculation, unfounded assumptions or hindsight reconstruction to supply deficiencies in the factual basis. *In re Warner*, 379 F.2d 1011, 1017 (CCPA 1967).

Sekiguchi does not support the Examiner's finding that "Sekiguchi teaches it is known to provide a container assembly wherein the laminar member is spaced from the flexible membrane by a distance less than the maximum possible extension of the flexible membrane toward the laminar member." Ans. 5. Thus, the Examiner's reasoning that it would have been obvious to apply that teaching to Hiroshi is predicated on a finding not factually supported in the record. *See id.* We agree with Appellants that the Examiner's further statement that modifying Hiroshi by spacing the laminar member by a distance less than the maximum possible extension of the flexible membrane toward the laminar member "provides a container liner seal that is less likely to rupture [due] to pressure build-up within the sealed container" impermissibly relies on hindsight gleaned from Appellants' disclosure. *See id.*; Reply Br. 9.

Accordingly, we do not sustain the rejection of claim 1 and its dependent claims 3, 4, 6, 8-10, and 13 as unpatentable over Hiroshi and Sekiguchi.

In rejecting claim 11 as unpatentable over Hiroshi, Sekiguchi, and Hardt, the Examiner does not rely on Hardt for any teaching directed to the spacing between the inner and outer caps, or otherwise articulate reasoning that would make up for the deficiency in the combination of Hiroshi and Sekiguchi. Thus, we do not sustain the rejection of claim 11 as unpatentable over Hiroshi, Sekiguchi, and Hardt.

DECISION

The Examiner's decision rejecting claims 1, 3, 4, 6, 8-11, and 13 is reversed.

REVERSED

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